filed December 12, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the Circuit Court of Appeals correctly sustained the findings of the Board of Tax Appeals that the taxpayer was a mere holding or investment company and that it was availed of for the purpose of preventing the imposition of the surtax upon its sole stockholder through the medium of permitting its gains and profits to accumulate instead of being divided or distributed within the meaning of Section 104 of the Revenue Act of 1928.

2. Whether the 50 percent tax assessed against the taxpayer pursuant to said section violates the Fifth and Tenth Amendments to the Constitution.

STATUTE INVOLVED

The statute involved is set forth in the Appendix, *infra.*

STATEMENT

The evidence before the Board of Tax Appeals consisted of a stipulation of facts and the testimony of one Valentine, the secretary of the taxpayer corporation. The material findings made by the Board upon this evidence may be summarized as follows (R. 19–34):

For many years prior to 1922, B. H. Howell Son & Company, a partnership composed of James H.

Post, Frederick H. Howell and Thomas A. Howell, had engaged in business as commission merchants making distribution of sugar and as fiscal and financial agents for various sugar companies. Early in 1922 the partners determined to discontinue the partnership business and to form a corporation to take over certain of the partnership assets and liabilities. Accordingly the taxpayer, Suffolk Securities Corporation, was formed on December 9, 1922, with Post and the two Howells as its stockholders. (R. 19, 20.) The partnership then transferred to taxpayer certain of its assets, chiefly securities and accounts receivable, but continued in business to perform its remaining contracts, later becoming incorporated. Post and the two Howells also transferred to taxpayer property owned by them individually. Post transferred stocks and bonds having a value of $2,110,412 and the others lesser amounts. The agreed net value of all the assets received by taxpayer was $7,373,129.56. (R. 20–21.)

Post became the sole stockholder of taxpayer on February 5, 1925. Prior to that date Post and Frederick H. Howell had transferred other securities belonging to them individually to a corporation, wholly owned by Thomas A. Howell, in exchange for the latter's shares of taxpayer's stock. (R. 21.) On that date Frederick H. Howell surrendered his stock in taxpayer and in consideration thereof taxpayer transferred certain of its

assets to a corporation of which Frederick H. Howell was the sole stockholder (R. 21). Post continued to be the sole stockholder in taxpayer until his death in 1938 (R. 21).

From time to time Post borrowed money from taxpayer. Between September 20 and November 30, 1926, he borrowed $42,066.33, which he repaid with interest on February 15, 1927. Between January 30 and March 27, 1928, he borrowed $27,000, which he repaid with interest on April 24, 1928. Between September 4, 1928, and November 30, 1930, he borrowed $662,019.63 of which he repaid $25,000 on August 25, 1930. (R. 22.)

Taxpayer, from the date of its organization to and including 1930, the taxable year in question, kept its books and filed its income tax returns on the accrual basis, and such returns reported no income or taxes due. Taxpayer carried its assets on its books and on the balance sheets in its income tax returns at cost. The balance sheets showed a deficit at the beginning and end of each year except at the end of the taxable year. On the last day of that year, November 30, 1930, the balance sheet showed a surplus of $72,947.03.[1] (R. 21–22.)

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[1] If market value were placed on the assets, the taxpayer would show a capital deficit rather than a surplus (R. 30).

The Board also found that at November 30, 1930, the taxpayer had liabilities of $1,695,441.94 and held assets having a total book value or cost of $3,534,079.81 and a total market value of $2,625,810.03 (R. 23). Thus, the Board stated in its opinion (R. 29–30) the book value or cost of the assets

During the years 1923–1930, taxpayer received dividends from domestic corporations amounting to $817,055.85—it received $160,762.52 during the taxable year—but at no time did it declare or pay dividends. Post himself received dividends from other corporations for he reported in his returns for each of the years 1926–1929 dividends of about $100,000 and, for 1930, dividends of $270,128.37 in his individual return and of $338,694.14 in a joint return with his wife. (R. 22.)

The Board's ultimate finding was that (R. 27-28)—

> During the taxable year, petitioner was a mere holding or investment company, and it was availed of for the purpose of preventing the imposition of the surtax upon its sole stockholder through the medium of permitting it gains and profits, to accumulate instead of being divided or distributed.

The court below affirmed the decision of the Board *per curiam* on the ground that the chief question "turns on Post's purpose in allowing the money to accumulate in the taxpayer's treasury; that was a question of fact as to which there was

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exceeded the liabilities by $1,838,637.87, and that their market value exceeded the obligations by $930,368.09. It should be observed, however, that Exhibit O of the stipulation of facts (R. 82–83) shows a book value for the taxpayer's assets of $5,691,223.52 and a market value of $4,105,522.78. These figures, which the taxpayer uses in computing the difference between book value and market value (Br. 9), show an excess over liabilities of $3,995,781.58 on the basis of book values, and $2,410,080.84 on the basis of market values.

substantial evidence to support the finding of the Board" (R. 151).

ARGUMENT

1. The decision below was based on correct principles. The question whether the taxpayer was availed of for the purpose interdicted by Section 104 of the Revenue Act of 1928 is one of fact on which the finding of the Board is conclusive if supported by substantial evidence. *Helvering* v. *Nat. Grocery Co.*, 304 U. S. 282, 294; *cf. Wilmington Trust Co.* v. *Commissioner*, 316 U. S. 164. The same is true of the Board's finding that the taxpayer was a mere holding or investment company. *Cf. R. L. Blaffer & Co.* v. *Commissioner*, 103 F. 2d 487 (C. C. A. 5th), certiorari denied, 308 U. S. 576, rehearing denied, 308 U. S. 635; *Almours Securities* v. *Commissioner*, 91 F. 2d 427 (C. C. A. 5th), certiorari denied, 302 U. S. 765, rehearing denied, 303 U. S. 666.

The subsidiary findings, which we have summarized in the statement, are not in dispute. We believe it evident, without the necessity of detailed discussion, that they are sufficient to support the ultimate determination.

2. The taxpayer contends that it was not a mere holding or investment company, because it was formed and operated to liquidate the partnership, and it had been unable to complete liquidation prior to the taxable year (Br. 11–12). Even if this argument had not been foreclosed by the

Board's findings and was properly available on review, it plainly would not merit a reversal. Since 1925 Post had been sole stockholder of the taxpayer, its function, as a device for liquidating the interests of the various members of the partnership, necessarily terminated at that time. As the Board stated, the taxpayer did not contend that in the taxable year it was a business corporation; "that is, one engaged in carrying on a business enterprise." Rather, it was "merely holding a limited amount of securities transferred to it by Post, and in that connection buying and selling securities, and investing and reinvesting its funds." (R. 29.) These activities characterize it as a mere holding or investment company. See *Almours Securities* v. *Commissioner, supra,* and *R. L. Blaffer & Co.* v. *Commissioner, supra.* The fact that the corporation may have held claims in its portfolio which had not yet been liquidated, and that it owed various obligations, which, it is alleged, prevented its own liquidation (Br. 12), is by no means inconsistent with this conclusion.

3. The taxpayer also contends that the facts (1) that distribution of the taxpayer's book surplus of $72,947.03 to Post in 1930 would only have increased his personal taxes by $15,000 and (2) that he had reported dividends in his personal returns of $1,008,952.39 for 1926 to 1930 in contrast with the dividends received by the taxpayer of only $817,055.85, negative any intent to avoid surtaxes

(Br. 13–14). But again it is obvious that the argument is without merit, even if it had not been foreclosed by the Board's finding. The statute does not require a showing that the corporation has been availed of to avoid *all* surtaxes; nor does it contemplate that the tax assessed merely compensate for the surtax avoided. *Cf. A. D. Saenger, Inc.* v. *Commissioner,* 84 F. 2d 23, 24 (C. C. A. 5th).

Similarly, there is no merit to the contention that there could have been no intention to avoid surtaxes because the taxpayer, although it had a book surplus, had an actual capital deficit, due to the depreciation in market value of its securities, and could not distribute dividends (Br. 10). The circumstance would at most be evidentiary. *Cf. A. D. Saenger, Inc.* v. *Commissioner, supra.* The compelling facts are (1) that the taxpayer received dividends between 1923 and 1930 in the sum of $817,055.85 and during the taxable year in excess of $160,000, which were not distributed; and (2) that from September 4, 1928, to November 30, 1930, Post borrowed from the taxpayer sums in excess of $650,000, thus taking dividends in another guise. Whether or not the corporation was *legally* able to make a distribution, it was equally useful as a medium for avoiding surtax.

Moreover, allegations that insolvency resulted from an unrealized depreciation in the market value of securities have been uniformly held not to remove the corporation from the reach of the

statute. *A. D. Saenger, Inc.* v. *Commissioner, supra; Almours Securities* v. *Commissioner, supra; R. L. Blaffer & Co.* v. *Commissioner, supra.* In *Helvering* v. *Nat. Grocery Co., supra,* this Court held that the fact an unrealized depreciation in the market value of securities exceeded the current profits would not prevent application of Section 104.[2] The question here is essentially the same.

4. The taxpayer urges that the Court review the question whether the tax imposed by Section 104 can be applied to a corporation which has no net income for normal tax purposes (Br. 10–11). Section 104 (c) provides that the term "net income" as used in that section shall mean "the net income as defined in section 21, increased by the sum of the amount of the dividend deduction allowed under section 23 (p) and the amount of the interest on obligations of the United States issued after September 1, 1917, which would be subject to tax in whole or in part in the hands of an individual owner." Section 21 defines net income as "the gross income computed under section 22, less the deductions allowed by section 23." The taxpayer's gross income less the deductions provided in Section 23 showed a net loss; however, inclusion in the computation of the amount of the dividends

[2] *W. S. Farish & Co.* v. *Commissioner*, 38 B. T. A. 150, affirmed, 104 F. 2d 833 (C. C. A. 5th), cited on p. 9 of the taxpayer's brief, involved an operating deficit and therefore is not in point, even if we assume, *arguendo*, that it was correctly decided.

for which the taxpayer had received a deduction for dividends received under Section 23 (p) showed the net income upon which the tax in issue was computed (R. 16).

The purpose of Section 104 (c), of course, is to include in the Section 104 net income, income which would be taxable in the hands of the stockholders even though deductible in the hands of the corporation. Construction of the statute in accordance with the suggestion of the taxpayer would patently distort this purpose. There is no call for consideration of the point by this Court.

5. The questions raised by the taxpayer as to the constitutionality of Section 104 were resolved by this Court's decision in *Helvering* v. *Nat. Grocery Co., supra.* Constitutional issues were also raised in the petitions for certiorari in the *Almours Securities* and *R. L. Blaffer & Co.* cases, *supra,* but the writs were denied. And the Court has recently held that a tax upon undistributed corporate profits is valid even where an applicable state statute prohibits distribution, *Helvering* v. *Northwest Steel Mills,* 311 U. S. 46, 52–53.

CONCLUSION

There is no conflict. The case was correctly decided, and it involves no questions calling for review. Accordingly, the petition for certiorari should be denied.

Respectfully submitted.

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JANUARY 1943.

APPENDIX

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

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(f) *Losses by corporations.*—In the case of a corporation, losses sustained during the taxable year and not compensated for by insurance or otherwise.

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(h) *Loss on sale of stock or securities.*—For disallowance of loss deduction in the case of sales of stock or securities where within thirty days before or after the date of the sale the taxpayer has acquired substantially identical property, see section 118.

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(j) *Bad debts.*—Debts ascertained to be worthless and charged off within the taxable year (or, in the discretion of the Commissioner, a reasonable addition to a reserve for bad debts); and when satisfied that a debt is recoverable only in part, the Commissioner may allow such debt to be charged off in part.

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SEC. 104. ACCUMULATION OF SURPLUS TO EVADE SURTAXES.

(a) If any corporation, however created or organized, is formed or availed of for the purpose of preventing the imposition of the surtax upon its shareholders through the

medium of permitting its gains and profits to accumulate instead of being divided or distributed, there shall be levied, collected, and paid for each taxable year upon the net income of such corporation a tax equal to 50 per centum of the amount thereof, which shall be in addition to the tax imposed by section 13 and shall be computed, collected, and paid upon the same basis and in the same manner and subject to the same provisions of law, including penalties, as that tax.

(b) The fact that any corporation is a mere holding or investment company, or that the gains or profits are permitted to accumulate beyond the reasonable needs of the business, shall be prima facie evidence of a purpose to escape the surtax.

(c) As used in this section the term "net income" means the net income as defined in section 21, increased by the sum of the amount of the dividend deduction allowed under section 23 (p) and the amount of the interest on obligations of the United States issued after September 1, 1917, which would be subject to tax in whole or in part in the hands of an individual owner.

(d) The tax imposed by this section shall not apply if all the shareholders of the corporation include (at the time of filing their returns) in their gross income their entire distributive shares, whether distributed or not, of the net income of the corporation for such year. Any amount so included in the gross income of a shareholder shall be treated as a dividend received. Any subsequent distribution made by the corporation out of the earnings or profits for such taxable year shall, if distributed to any shareholder who has so included in his gross income his distributive share, be exempt